

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CURTIS N. MERCER,	§
	§ No. 17, 2011
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0804033000
	§
Plaintiff Below-	§
Appellee.	§

Submitted: May 27, 2011
Decided: July 20, 2011

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 20th day of July 2011, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Curtis N. Mercer, filed an appeal from the Superior Court's December 15, 2010 order denying his first motion for postconviction relief pursuant to Superior Court Criminal Rule 61.¹ We find no merit to the appeal. Accordingly, we affirm.

(2) The record before us reflects that, in January 2009, Mercer was found guilty by a Superior Court jury of four counts of Rape in the First

¹ Because Mercer's first postconviction motion raised claims of ineffective assistance of counsel, the Superior Court requested Mercer's trial attorney's affidavit. Rule 61(g) (1) and (2); *Horne v. State*, 887 A.2d 973, 974-75 (Del. 2005).

Degree, one count of Kidnapping in the First Degree, two counts of Possession of a Deadly Weapon During the Commission of a Felony, one count of Burglary in the First Degree, one count of Tampering With Physical Evidence, one count of Misdemeanor Theft and one count of Terroristic Threatening. Mercer was sentenced to a total of four life terms plus nine additional years at Level V. Mercer's convictions were affirmed by this Court on direct appeal.²

(3) In this appeal from the Superior Court's denial of his first postconviction motion, Mercer claims that a) the Superior Court abused its discretion and subjected him to double jeopardy when it denied his motion for judgment of acquittal or, in the alternative, failed to merge his multiple rape charges into one or two charges; b) his indictment was defective; c) his counsel provided ineffective assistance by failing to inform him of the State's plea offer, advising him against testifying and failing to contest the multiple rape counts; and d) the State failed to establish that he displayed a weapon during the commission of rape. To the extent that Mercer fails to present claims that were raised below, all such claims are deemed to be waived and will not be addressed by this Court.³

² *Mercer v. State*, Del. Supr., No. 153, 2009, Ridgely, J. (Nov. 25, 2009).

³ *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his postconviction motion filed in the Superior Court, Mercer also argued that a) his attorney was ineffective for failing

(4) Under Delaware law, when deciding a motion for postconviction relief, the Superior Court must first determine whether the defendant has met the procedural requirements of Rule 61 before considering the merits of his claims.⁴ In this case, Mercer's claim that the Superior Court erred by failing to either grant his motion for acquittal or merge his multiple rape charges into one or two charges was unsuccessfully raised at trial. As such, the claim is barred under Rule 61(i) (4) as previously adjudicated.⁵ Moreover, Mercer cannot overcome the procedural bar because he has not demonstrated that subsequent legal developments have revealed that the trial court lacked the authority to convict him, the previous ruling was clearly in error or the factual basis for the previous ruling has changed so as to render it unjust.⁶

(5) Mercer's claim that his indictment was defective also is unavailing. First, Mercer failed to raise the claim prior to trial as required by Rules 12(b) (2) and 12(f), thereby waiving the claim post-trial.⁷ Moreover, there is no factual support for the claim. While Mercer contends that the

to contest the indictment and conduct a thorough investigation; b) there was insufficient evidence to support his conviction of kidnapping; and c) there was a compromise verdict.

⁴ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁵ The record reflects that, while the Superior Court denied the motion, defense counsel's arguments ultimately resulted in the reduction of the number of rape counts from eight to four.

⁶ *Weedon v. State*, 750 A.2d 521, 527-28 (Del. 2000). Because Mercer did not raise this issue on direct appeal, it also is procedurally barred under Rule 61(i) (3).

⁷ *Stewart v. State*, Del. Supr., No. 173, 2003, Jacobs, J. (July 29, 2003).

indictment failed to properly specify the acts of sexual intercourse allegedly committed and the type of deadly weapon allegedly displayed, the language of the indictment itself reflects otherwise. The indictment is a plain, concise and definite written statement of the essential facts constituting the offenses charged, as required by Superior Court Criminal Rule 7(c), and, as such, properly informed the defendant of the charges against him and properly protected his double jeopardy rights.⁸

(6) Mercer's claim that the State failed to prove that he displayed a weapon during the commission of the rape was not presented to the Superior Court in the first instance. We, therefore, decline to consider the claim for the first time in this appeal.⁹

(7) Mercer claims that his counsel provided ineffective assistance by failing to advise him of the State's plea offer, by advising him not to testify and by failing to contest his multiple rape charges. In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings

⁸ *Mayo v. State*, 458 A.2d 26, 27 (1983).

⁹ Supr. Ct. R. 8.

would have been different.¹⁰ Although not insurmountable, the Strickland standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.¹¹ The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.¹²

(8) Mercer's first claim of ineffective assistance is factually incorrect, as Mercer admits in his opening brief. Mercer's second claim of ineffective assistance was not presented to the Superior Court in the first instance and we decline to address it for the first time in this appeal.¹³ The record reflects that Mercer's third claim of ineffective assistance also is factually incorrect. His counsel argued the multiplicity claim when he moved for judgment of acquittal. Ultimately, eight counts of Rape in the First Degree were reduced to four as the result of Mercer's counsel's arguments. We, thus, conclude that all of Mercer's claims of ineffective assistance of counsel are without merit.

¹⁰ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¹¹ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

¹² *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹³ Supr. Ct. R. 8.

NOW, THEREFORE, IT IS ORDERED that the judgment of the
Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice